

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
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| Petition of Core Communications, Inc. |) | |
| for Forbearance Under 47 U.S.C. §160(c) |) | |
| from Rate Regulation Pursuant to § 251(g) |) | WC Docket No. 06-100 |
| and for Forbearance from the Rate Averaging |) | |
| and Integration Regulation to § 254(g) |) | |

**COMMENTS OF THE
NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE**

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On the Comments:

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Date: June 2, 2006

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I. INTRODUCTION

In response to the Public Notice released on May 5, 2006,¹ the New Jersey Division of the Ratepayer Advocate (“Ratepayer Advocate”) hereby submits its comments in response to DA 06-989 and Core Communications, Inc.’s (“Core’s”) petition asking for forbearance with regard to certain provisions of the Federal Telecommunications Act of 1996. Specifically, Core requests that the Commission forbear from (i) section 251(g) and its implementing rules “to the extent they apply to or regulate the rate for compensation for switched ‘exchange access, information access, and exchange services for such access to interexchange carriers and information service providers’ pursuant to state and federal access charge rules” and (ii) “any limitation, by [Commission] rule or otherwise, on the scope of section 251(b)(5) that is implied from section 251(g) preserving receipt of switched

¹/ See Public Notice, DA-06-989, dated May 5, 2006, establishing pleading cycle with Comments due on June 5, 2006 and reply comments due on June 26, 2006.

access charges.”² In addition, Core asks the Commission to forbear from the rate averaging and integration requirements contained in section 254(g) of the Act and its implementing rules.³ Core requests that the Commission apply the forbearance requested in its petition to all telecommunications carriers such that grant of its petition would subject these carriers to section 251(b)(5) of the Act for rate setting purposes.⁴

SUMMARY

The petition filed by Core is without merit and should be denied. The forbearance petition lacks empirical and evidentiary support and offers mere conclusions in support of the petition. As discussed more fully below, there are Constitutional infirmities with 47 U.S.C. § 160 (Section 10 of the Federal Telecommunications Act of 1996). These infirmities preclude exercise of forbearance by the FCC. The petition improperly seeks relief that in the first instance that is subject to an ongoing rulemaking. In addition, as Core correctly notes, there is a pending rulemaking addressing intercarrier compensation.⁵ Core’s petition seeks to change the status quo and effectively prejudice the outcome of the ongoing rulemaking. This alone justifies denial of the petition. As a result, the forbearance request is not in the public interest or in the interest of consumers.

II. INTEREST OF THE RATEPAYER ADVOCATE IN THE INSTANT PROCEEDING.

The Ratepayer Advocate is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential,

²/ Core Forbearance Petition at 2; *see also* 47 U.S.C. §§ 251(b)(5), 251(g).

³/ Core Forbearance Petition at 1-2; *see also* 47 U.S.C. § 254(g).

⁴/ Core Forbearance Petition at 1; *see also* 47 U.S.C. § 251(b)(5).

⁵/ *See Intercarrier Compensation*, CC Docket No. 01-92; *Access Charges and IP Telephony*, WC Docket No. 05-276.

business, commercial, and industrial entities. The Ratepayer Advocate participates actively in relevant Federal and state administrative and judicial proceedings.

III. THE COMMISSION SHOULD DENY CORE'S FORBEARANCE REQUESTS

Core asks that the Commission forbear from Section 251(g) of the Act as follows:

To the extent they apply to or regulate the rate of compensation for switched 'exchange access, information access, and exchange services for such access to interexchange carriers and information service providers,' pursuant to state and federal access charge rules; and

Any limitation, by FCC rule or otherwise, on the scope of section 251(b)(5) that is implied from section 251(g) preserving receipt of switched access charges. (footnotes omitted)

With respect to 254(g), Core requests "that the Commission forbear from that statutory provision, and its implementing rules related to rate averaging or integration."

According to Core, a decade later rate convergence has not happened because Sections 251(g) and 254(g), as implemented enable carriers, incumbent local exchange carriers to engage in regulatory arbitrage to collect above-cost intercarrier compensation rates and pay below-cost intercarrier compensation.⁶

Core opines that forbearance is appropriate in order to eliminate regulatory arbitrage and implicit subsidies and serve the public interest. In fact, Core claims that eliminating regulatory arbitrage and implicit subsidies promotes competition and the maintenance of regulatory requirements that codify regulatory arbitrage and implicit subsidies does not ensure that carrier charges and practices are just, reasonable, and nondiscriminatory.⁷ Similarly, Core asserts that the regulations are not necessary to

⁶/ Core's Petition at 3.

⁷/ *Id.*

protect consumers.

After reciting the events from 1996 forward until the present that gave rise to regulatory arbitrage and the FCC's inability to combat, Core argues that carriers are able to collect and pay materially different rates for the same functionality.⁸ As a result, Core concludes that forbearance is necessary and appropriate. In three and one-half pages, Core asserts that it meet the three criteria for a grant of forbearance from both Sections 251(g) and 254(g). Other than the recitation of mere conclusions with out any empirical support or record evidence, Core leaps to the conclusion that the FCC should grant the requested relief and eliminate regulatory arbitrage and unify intercarrier compensation rates for all traffic, including intrastate traffic.

At the heart of Core's petition, is that any unified intercarrier compensation scheme should apply to intrastate and interstate rates and that they should be the same. Core's request is premised on the erroneous assumption that the FCC has jurisdiction to set intercarrier compensation rates for intrastate calls. The Ratepayer Advocate submits that state commissions have exclusive jurisdiction to set intrastate intercarrier compensation rates under Section 2(b) of the Act. In *AT&T Corp. v. Iowa Utilities Board*, the Supreme Court addressed the relationship by and between Sections 251, 252, and Section 2(b) of the Act.⁹

⁸/ *Id.* At 3-16.

⁹/ *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S.366, 384 (1999).

The Supreme Court confirmed the dual role of the FCC and state commissions in pricing network elements by stating that:

[Section] 252(c)(2) entrusts the task of establishing rates to the state commissions . . . The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in 252(d). It is the states that will apply those standards and implement that methodology, determining the concrete results in particular circumstance.¹⁰

The FCC may not set intrastate rates whether they are wholesale UNE rates, intrastate intercarrier compensation rates, or retail rates for consumers with respect to its authority under Sections 251, 252, and 271 of the Act. This authority rests firmly within the control of state commissions under Section 2(b). The Court has approved the setting of intrastate rates by the FCC in very limited circumstances, for example, for payphones based upon the specific provisions of Section 276. *See Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997); *New Eng. Pub. Communs. Council Inc., v. FCC*, 334 F.3d 69 (D.C. Cir. 2003). The Court found that:

The Communications Act of 1934 establishes "a system of dual state and federal regulation over telephone service," under which the Commission has the power to regulate "interstate and foreign commerce in wire and radio communication," 47 U.S.C. § 151, but is generally forbidden from entering the field of intrastate communications service, which remains the province of the states, *id.* § 152(b).¹¹

¹⁰/ *Id.*

¹¹/ *New Eng. Pub. Communs. Council Inc.*, 334 F.3d at 75.

As a result, the Court found that the FCC could set the intrastate payphone line rates for Bell Operating Companies because of the specific provisions of Section 276, but lacked the authority to set intrastate payphone line rates for local exchange carriers.¹² There is no provision in the Act that preempts states from regulating intrastate intercarrier compensation rates. Without an explicit statement, that Congress intended preemption to apply, preemption can not be presumed. See *Bates v. Dow*,¹³ wherein the Supreme Court reconfirmed that without such a clear and manifest intent expressed by Congress, preemption is not appropriate.

There is nothing in the Act with respect to intercarrier compensation that evidences that Congress's intent was to alter Section 2(b) of the Act and otherwise permit FCC to set intrastate rates. The Court recently explained in *Am. Library Ass'n. v. FCC*, 406 F.3d, 689, 698 (D.C. Cir. 2005): "The FCC, like other federal agencies, 'literally has no power to act . . . unless and until Congress confers powers upon it' . . ." The Supreme Court has clearly spoken that Section 2(b) fences off intrastate telecommunications matters from FCC regulation. See *Public Louisiana Service Commission v. FCC*, 476 U.S. 355, 374 (1986). Any purported construction of the Act to permit or allow the FCC to regulate intrastate rates absent expressed provisions such as those contained in Section 276 is misplaced and exceeds its authority. The Court has overturned FCC action where the FCC's actions conflict with the plain words of the statute. See *City of Dallas, v. FCC*, 165 F.3d 341, 347-348 (5th Cir. 1999) wherein the Court rejected the FCC claim that local franchising authority is limited to Section 621 of the Act.

¹²/ *Id.* at 75, 78.

¹³/ *Bates v. Dow*, ___ U.S. ___, 161 L.Ed, 2d 687; 125 S. Ct 1788 (2005).

As a result, consistent with Section 2(b) of the Act, state commissions have the jurisdiction and authority to set intrastate rates.

Notwithstanding the fact that the forbearance petition is without merit and should be denied by the Commission based on the reasons discussed above, the Ratepayer Advocate renews the arguments and incorporates those arguments attached hereto with respect to the constitutional infirmities associated with the Commission's forbearance authority. Specifically any exercise of the forbearance authority contained in Section 10 of the Act violates separation of powers, equal protection, 10th Amendment, and 11th Amendment as outlined in detail in our Ex Parte filing dated December 7, 2004 in the UNE Remand proceeding (CC Docket No. 01-338 and WC Docket No. 04-313).

IV. CONCLUSION

The Commission should not grant Core's petition. Ultimately, the grant of any relief would harm ratepayers. Such a result is contrary to the public interest. Therefore, the Ratepayer Advocate urges that the FCC deny the petition.

Respectfully submitted,

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Dated: June 2, 2006